Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	CC Docket No. 96-45
Federal-State Joint Board on	)	
Universal Service	)	

REPLY COMMENTS OF
VANGUARD CELLULAR SYSTEMS, INC.

Vanguard Cellular Systems, Inc. ("Vanguard"), by its attorneys, hereby submits these reply comments in response to filings made in the above-referenced docket on December 19, 1996. As shown below, the Commission should adopt rules that promote wireless participation in the provision of universal service and clarify jurisdictional issues raised in this proceeding that threaten to burden commercial mobile radio service ("CMRS") providers with extraordinarily high and duplicative universal service contribution payments.

I. Introduction

As described in its comments, Vanguard supports the Joint Board's recommendation to establish "competitive neutrality" as an additional principle upon which to base policies for the preservation and advancement of universal service.[1/] Wireless carriers have a unique ability to provide cost-effective core telecommunications and advanced services in traditionally unserved or underserved communities throughout the nation, and competitively neutral rules will further the public interest by increasing the opportunities for wireless services providers to offer these services. Wireless participation, however, can happen only if the Commission's universal

---

1/ *See* Comments of Vanguard Cellular Systems, Inc., CC Docket No. 96-45 (filed December 19, 1996); *see also* Comments of Vanguard Cellular Systems, Inc., CC Docket No. 96-45 (filed April 12, 1996); Reply Comments of Vanguard Cellular Systems, Inc., CC Docket No. 96-45 (filed May 8, 1996); Comments of Vanguard Cellular Systems, Inc., CC Docket No. 96-45 (filed August 2, 1996).

service rules promote consumer choice through simple and explicit universal service support mechanisms. Moreover, the Commission must acknowledge the jurisdictionally interstate nature of CMRS service, consistent with various provisions of the Omnibus Budget Reconciliation Act of 1993, and ensure that CMRS providers are not improperly required to contribute to state universal service programs.

II. The Commission's Rules Must Encourage the Participation of Wireless Providers in the Provision of Universal Service.

The rules implementing Section 254 of the Communications Act should not disadvantage wireless providers that seek to serve the needs of the American public, including high cost and rural communities. As recognized by a number of commenters, wireless providers have the ability to play an integral role in achieving Congress' universal service goals.[2/] Accordingly, the Commission should adopt rules that ensure that customers have a wide range of choices to satisfy their telecommunications and advanced services needs.[3/]

A. Service Area Definition

As an initial matter, realistic and pro-competitive service areas must be defined to permit wireless participation in the provision of universal service. In its comments, Vanguard recommended that where a rural telephone company's study area is non-contiguous and covers discrete regions within a state, the Commission should define the universal service "service area" as the contiguous portions of the rural telephone companies study area, or alternatively, the areas

---

2/ *See, e.g.,* Comments of Northern Telecom, Inc. at 23 (recognizing that there are many wireless alternatives to the wireline delivery of telephone service, including traditional CMRS, fixed wireless local loop services, local multipoint distribution service and satellite services).

3/ *See generally Recommended Decision*, CC Docket No. 96-45 at ¶ 461 (rel. November 8, 1996) (*"Recommended Decision"*) (all technologies have their advantages and disadvantages and it is best to permit consumers to evaluate those relative costs and benefits with respect to their individual needs and circumstances).

in which the particular carrier proposes to provide service, *e.g.*, a new entrant's telephone franchise area or a wireless company's service area.[4/] Adoption of either of these definitions will ensure that wireless carriers are not excluded from federal universal service support mechanisms.[5/]

Adoption of a more refined definition appropriately reflects that wireless providers are licensed on a different basis than wireline service providers. The study areas of many rural telephone companies, as established by state regulatory agencies, are non-contiguous and many cover geographically distinct areas.[6/] Wireless carriers, in contrast, are licensed by the Commission within prescribed geographic regions that may or may not coincide with state-prescribed LEC service boundaries. Mandating that these companies serve larger, and potentially dispersed areas, will ensure that only incumbent LECs are provided the benefits of federal universal service mechanisms.[7/]

4/ The Joint Board has recommended a comparable "geographic area" definition to be applied in determining eligibility for financial support for the provision of universal service to schools, libraries and health care providers. *See generally Recommended Decision* at ¶ 543 ("using an expansive definition of geographic areas might be unfair to a small telephone company serving a single community, . . . for such a definition would permit it to be compelled to serve other schools outside its geographic market"); *see also* Comments of the Rural Telephone Coalition at 38 (agreeing with the Joint Board's recommendation that "geographic area" should mean the area in which the service provider is seeking to serve customers).

5/ *See also* Comments of the United States Telephone Association at 31-32 (urging that all carriers have the flexibility to receive universal service support for geographic areas smaller than their service areas to minimize opportunities for arbitrage).

6/ *See* Comments of Cox Communications, Inc. at 6-8; Comments of Nextel Communications, Inc. at 9-11.

7/ *See Joint Board Recommendations* at ¶ 176 ("[I]f states simply structure service areas to fit the contours of an incumbent's facilities, a new entrant, especially a CMRS-based provider, might find it difficult to conform its signal or service areas to the precise contours of the incumbent's area.").

Contrary to LEC comments in this proceeding, modifying the Joint Board's rural service area proposal will not promote "cream-skimming."[8/] Indeed, the proposed modification will not permit CMRS carriers to define their service areas in ways that would result in the provision of service in only the most lucrative areas, as several LECs have argued. The Commission has carefully determined the service areas for CMRS providers and has adopted explicit build-out obligations for the provision of service throughout a given geographic region. These boundaries appropriately form the service area contours for determining universal service eligibility and guarantee that wireless providers will offer service to a significant percentage of their licensed markets within a specified time period. Basing universal service eligibility requirements on the satisfaction of these build-out obligations will prevent CMRS providers from gaming the federal universal service system. Moreover, because CMRS coverage areas are relatively large, they are unlikely to engage in cream skimming — an arrangement that is available to a CMRS customer "in town" also will be available anywhere else in the coverage area.

B. Equal Access

A few commenters urge the Commission to include equal access in the definition of universal service under Section 254 of the 1996 Act.[9/] Wireless providers, however, should not be forced to offer equal access as a universal service. First, mandating equal access is inconsistent with the express direction of Congress. Congress, with the passage of the 1996 Act, determined that CMRS providers should not be subject to equal access obligations. Congress

---

8/ *See* Comments of Small Western LECs at 12-13 (claiming that wireless providers will likely provide better service in a rural town and marginal or nonexistent service in outlying areas); Comments of MVNW Inc./Management at 8-9 (supporting recommendation that current study areas of rural telephone companies be used to determine universal service eligibility).

9/ *See* Comments of WorldCom at 2-3 (arguing that equal access to interexchange service should be a component of universal service); Comments of the Ad Hoc Telecommunications Users Committee at 3-5 (same).

provided that CMRS providers "shall not be required to provide equal access to common carriers for the provision of telephone toll services."[10/] Imposing equal access requirements in the implementation of Section 254 would contravene the express mandate of Section 705 of the 1996 Act.[11/]

Second, mandating equal access would be inconsistent with Congress' intent to maximize consumer choice. Unnecessarily increasing the costs of providing wireless service by requiring equal access as an element of universal service would reduce the ability of CMRS providers to offer universal services in areas, and under circumstances, where they are best equipped to effectively and efficiently provide service. The potential costs to wireless carriers of upgrading facilities are significant and should not be incurred in the face of an unambiguous statutory pronouncement to the contrary.[12/]

An equal access requirement also would impose significant costs on rural wireline carriers, the intended beneficiaries of high cost subsidies. Most, if not all, of the areas that do not today have equal access are rural. If equal access were added to the proposed core services, then landline carriers in those areas would be forced to upgrade. Indeed, unlike CMRS providers, which could choose not to qualify for universal service funding, existing carriers of

---

10/ *See* 47 U.S.C. § 332(c)(8).

11/ The governing rule of statutory construction provides that, where "Congress has directly spoken to the precise question at issue . . . that is the end of the matter; for the court, as well as the agency must give effect to the unambiguously expressed intend of Congress." *Chevron v. Natural Resources Defense Council*, 467 U.S. 837, 842 (1984). Moreover, proper statutory analysis requires that all parts of a statute be considered when the meaning of the statute and the intent of Congress is determined. *See Crandon v. U.S.*, 494 U.S. 152, 158 (1990) (courts must look to the "design of the statute as a whole").

12/ *See Joint Board Recommendations* at 66 ("[E]qual access should not be supported because of potential costs to wireless carriers in upgrading facilities and because wireless carriers are not currently required to provide equal access.").

last resort would have no choice but to spend the money necessary to implement equal access, even in areas where it is uneconomic to do so or where to do so would require purchasing a new switch. Thus, requiring equal access as a condition of receiving universal service funding would reduce, not increase, consumer choice and would impose unnecessary costs on rural carriers.

III. The Commission Must Confirm that CMRS Providers Are Subject to State Universal Service Contribution Obligations Only in Limited Circumstances.

The Commission should confirm that CMRS providers are required to contribute to state universal service programs only if they are substitutes for landline service within state boundaries. Indeed, Section 332(c)(3) of the Budget Act specifically exempts CMRS providers from state universal service obligations when they do not provide "the only means of obtaining basic telephone service within a state."[13/]

Section 332(c)(3) of the 1993 Budget Act expressly provides that "no state or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service."[14/] Moreover, the second clause of Section 332(c)(3) imposes the following limiting condition on the general clause:

> Nothing in this subparagraph shall exempt providers of commercial mobile services (*where such services are a substitute for landline telephone exchange service for a substantial portion of the communications within such State*) from requirements imposed by a State commission on all providers of telecommunications services necessary to ensure the *universal availability of telecommunications service at affordable rates.*[15/]

In so amending the Communications Act in 1993, Congress preempted state and entry regulation to "foster the growth and development of mobile services that, by their nature, operate without

---

13/ *See* 47 U.S.C. § 332(c)(3).

14/ *Id.*

15/ *Id.* (emphasis provided).

regard to state lines as an integral part of the national telecommunications infrastructure."[16/] In addition, Congress expressly directed that state universal service mechanisms could be applied to CMRS only "where such services are a substitute for landline telephone exchange service for a substantial portion of the communications within such State."[17/]

A commercial mobile radio service, therefore, is not a substitute for landline telephone exchange service for a substantial portion of the communications within a state unless it is the only "means of obtaining basic telephone service" within the state. Consequently, CMRS providers can be subject to contributions to state universal service support systems under Section 332(c)(3) only under very limited circumstances. The Commission's universal service rules must recognize this important limitation on state authority to require CMRS providers to contribute to state-sponsored universal service programs.

Finally, Section 254 of the 1996 Act does not repeal Section 332(c)(3)'s exemption of CMRS providers from contributing to state universal service programs. Section 254(d) and (f) of the 1996 Act impose specific duties on telecommunications carriers to contribute to both state

---

16/ *See* H.R. Rep. No. 111, 103rd Cong., 1st Sess. 260 (1993); *see also* H.R. Conf. Rep. No. 213, 103rd Cong., 1st Sess. 490 (1993) (stating that the intent of Section 332 (c)(1)(A) "is to establish a Federal regulatory framework to govern the offering of all commercial mobile services").

17/ The legislative history clarifies any ambiguity as to when a commercial mobile radio service is a "substitute for landline telephone exchange service for a substantial portion of the communications within a state." The legislative history states:

> the Conferees intend that the Commission should permit States to regulate radio service provided for basic telephone service *if subscribers have no alternative means of obtaining basic telephone service*. If, however, several companies offer radio service as a means of providing basic telephone service in competition with each other, such that consumers can choose among alternative providers of this service, it is not the intention of the conferees that States should be permitted to regulate these competitive services . . . .

See Id. at 493.

and federal universal service programs to the extent they provide intrastate and interstate services. However, Section 332(c)(3) provides important interpretive guidance as to how CMRS providers should be classified and, consequently, how Sections 254(d) and (f) should be applied. Under Section 332(c)(3), only if a CMRS provider is a substitute for landline local exchange service for a substantial portion of the state, is it treated as providing intrastate services and, therefore, required to contribute to a state-sponsored universal service program. Thus, Section 332(c)(3) establishes the conditions under which Section 254(f) can be applied to CMRS providers.

IV. Contributions to the Universal Service Fund Should Be Allocated Based on Total Revenues of Telecommunications Carriers.

Many commenting parties argue that the Commission should not determine carriers' contributions to the universal service fund on the basis of total revenues, but rather should use only interstate revenues in that calculation. These parties argue that using total revenues is unlawful and would not fairly allocate the costs of universal service. Neither claim is correct.

First, it is important for the Commission to recognize that its universal service program, while denominated as support for interstate services, are based on cost allocations that are widely recognized as providing support for intrastate services. This is particularly the case in high cost areas. Allocating universal service funding obligations on the basis of total revenues merely is further application of this principle.

Second, there is no legal bar to the Commission adopting any allocation methodology, *so long as the funds used to support universal service are taken solely from interstate revenues.*[18/] Section 2(b) does not prevent the Commission from *considering* a carrier's intrastate operations

---

18/ In this regard, it is noteworthy that the *Recommended Decision* did not propose to require payment of universal service fees out of interstate revenues alone. *See Recommended Decision* at ¶ 817.

when it regulates interstate matters, but merely from regulating those intrastate operations. Just as the several States are free to adopt any reasonable allocation mechanisms for universal service (or for that matter, for determining how state corporate income taxes are calculated), the Commission is free to adopt its own allocation mechanism, so long as that mechanism is reasonable.

Third, the use of total revenues as an allocation mechanism is reasonable. Total revenues are a much better indicator of the nature of a telecommunications carrier's services, as well as the benefits it is likely to receive from universal service mechanisms, than interstate revenues. At the same time, adopting an allocator that uses total revenues will spread the burden of universal service funding more equitably over the entire telecommunications industry, rather than concentrating those costs on those carriers that provide predominantly interstate services. This is particularly important because several recent State commission decisions suggest that State universal service costs may be relatively small compared to federal universal service costs.[19/] Thus, allocating universal service costs on the basis of total revenues is the most reasonable course the Commission can adopt.

V. Conclusion

In this proceeding, the Commission has a unique opportunity to address broadly the core telecommunications and advanced services needs of the American public. To implement Congress's universal service mandate, the Commission must adopt competitively neutral rules

---

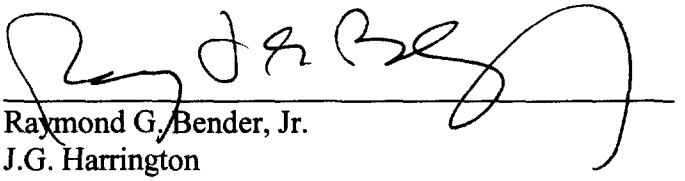
19/ For instance, the Washington Utilities and Transportation Commission found that revenues for U S West's basic residential service cover the costs of providing that service. *See Washington Utilities and Transportation Commission v. U S West Communications, Inc.*, Docket No. UT-950200, Fifth Supplemental Order, Commission Decision and Order Rejecting Tariff Revisions; Requiring Refiling (April 11, 1996). Washington is one of several states that have made similar findings, belying LEC claims that there are significant subsidies flowing from business to residential services.

that offer wireless providers meaningful possibilities for participation in the provision of universal service throughout the nation. Moreover, the Commission must ensure that the Congressional intent to strictly limit state regulation of CMRS is not disrupted absent a new, unambiguous Congressional directive.

For these reasons, Vanguard Cellular Systems, Inc. respectfully requests that the Commission adopt rules that are consistent with the proposals identified herein.

Respectfully submitted,

VANGUARD CELLULAR SYSTEMS, INC.

By: 

Raymond G. Bender, Jr.
J.G. Harrington

Its Attorneys

DOW, LOHNES & ALBERTSON, PLLC
1200 New Hampshire Avenue, N.W.
Washington, D.C. 20036
(202) 776-2000

January 10, 1997

CERTIFICATE OF SERVICE

I, V. Lynne Lyttle, do hereby certify that on this 10th day of January, 1997, a copy of the foregoing "Reply Comments" was sent via first-class mail, postage pre-paid, to the following:

*The Honorable Reed E. Hundt, Chairman
Federal Communications Commission
1919 M Street, N.W., Room 814
Washington, D.C. 20554

*The Honorable Rachelle B. Chong
Commissioner
Federal Communications Commission
1919 M Street, N.W., Room 844
Washington, D.C. 20554

The Honorable Julia Johnson
Commissioner
Florida Public Service Commission
2540 Shumard Oak Blvd.
Gerald Gunter Building
Tallahassee, FL 32399-0850

The Honorable Kenneth McClure
Commissioner
Missouri Public Service Commission
301 W. High Street, Suite 530
Jefferson City, MO 65101

The Honorable Sharon L. Nelson
Chairman
Washington Utilities and Transportation
Commission
P.O. Box 47250
Olympia, WA 98504-7250

The Honorable Laska Schoenfelder
Commissioner
South Dakota Public Utilities Commission
State Capital, 500 E. Capitol Street
Pierre, SD 57501-5070

Martha S. Hogerty, Esquire
Public Counsel for the State of Missouri
P.O. Box 7800
Jefferson City, MO 65102

Paul E. Pederson, State Staff Chair
Missouri Public Service Commission
P.O. Box 360
Jefferson City, MO 65102

*Lisa Boehley
Federal Communications Commission
2100 M Street, N.W., Room 8605
Washington, D.C. 20554

Charles Bolle
South Dakota Public Utilities Commission
State Capitol, 500 E. Capitol Street
Pierre, SD 57501-5070

Deonne Bruning
Nebraska Public Service Commission
300 The Atrium
1200 N Street, P.O. Box 94927
Lincoln, NE 68509-4927

*James Casserly
Federal Communications Commission
Office of Commissioner Ness
1919 M Street, N.W., Room 832
Washington, D.C. 20554

*John Clark
Federal Communications Commission
2100 M Street, N.W., Room 8619
Washington, D.C. 20554

*Bryan Clopton
Federal Communications Commission
2100 M Street, N.W., Room 8615
Washington, D.C. 20554

*Irene Flannery
Federal Communications Commission
2100 M Street, N.W., Room 8922
Washington, D.C. 20554

*Daniel Gonzalez
Federal Communications Commission
Office of Commissioner Chong
1919 M Street, N.W., Room 844
Washington, D.C 20554

*Emily Hoffnar
Federal Communications Commission
2100 M Street, N.W., Room 8623
Washington, D.C. 20554

*L. Charles Keller
Federal Communications Commission
2100 M Street, N.W., Room 8918
Washington, D.C. 20554

Lori Kenyon
Alaska Public Utilities Commission
1016 West Sixth Avenue, Suite 400
Anchorage, AK 99501

*David Krech
Federal Communications Commission
2025 M Street, N.W., Room 7130
Washington, D.C. 20554

Debra M. Kriete
Pennsylvania Public Utilities Commission
P.O. Box 3265
Harrisburg, PA 17105-3265

*Diane Law
Federal Communications Commission
2100 M Street, N.W., Room 8920
Washington, D.C. 20554

Mark Long
Florida Public Service Commission
2540 Shumard Oak Blvd.
Gerald Gunter Building
Tallahassee, FL 32399

*Robert Loube
Federal Communications Commission
2100 M Street, N.W., Room 8914
Washington, D.C. 20554

Samuel Loudenslager
Arkansas Public Service Commission
P.O. Box 400
Little Rock, AR 72203-0400

Sandra Makeeff
Iowa Utilities Board
Lucas State Office Building
Des Moines, IA 50319

Philip F. McClelland
Pennsylvania Office of Consumer
Advocate
1425 Strawberry Square
Harrisburg, PA 17120

Michael A. McRae
D.C. Office of the People's Counsel
1133 15th Street, N.W., Suite 500
Washington, D.C. 20005

*Tejal Mehta
Federal Communications Commission
2100 M Street, N.W., Room 8625
Washington, D.C. 20554

Terry Monroe
New York Public Service Commission
3 Empire Plaza
Albany, NY 12223

*John Morabito
Deputy Division Chief, Accounting
and Audits
Federal Communications Commission
2000 L Street, N.W., Suite 812
Washington, D.C. 20554

*Mark Nadel
Federal Communications Commission
2100 M Street, N.W., Room 8916
Washington, D.C. 20554

*John Nakahata
Federal Communications Commission
Office of the Chairman
1919 M Street, N.W., Room 814
Washington, D.C. 20554

Lee Palagyi
Washington Utilities and Transportation
Commission
1300 South Evergreen Park Drive S.W.
Olympia, WA 98504

*Kimberly Parker
Federal Communications Commission
2100 M Street, N.W., Room 8609
Washington, D.C. 20554

Barry Payne
Indiana Office of the Consumer Counsel
100 North Senate Avenue, Room N501
Indianapolis, IN 46204-2208

*Sheryl Todd (w/ diskette)
Common Carrier Bureau
Federal Communications Commission
2100 M Street, N.W., Room 8611
Washington, D.C. 20554

*Jeanine Poltronieri
Federal Communications Commission
2100 M Street, N.W., Room 8924
Washington, D.C. 20554

James Bradford Ramsay
National Association of Regulatory Utility
Commissioners
P.O. Box 684
Washington, D.C. 20044-0684

Brian Roberts
California Public Utilities Commission
505 Van Ness Avenue
San Francisco, CA 94102

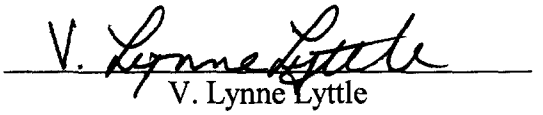
*Gary Seigel
Federal Communications Commission
2000 L Street, N.W., Suite 812
Washington, D.C. 20554

*Richard Smith
Federal Communications Commission
2100 M Street, N.W., Room 8605
Washington, D.C. 20554

*Pamela Szymczak
Federal Communications Commission
2100 M Street, N.W., Room 8912
Washington, D.C. 20554

*Lori Wright
Federal Communications Commission
2100 M Street, N.W., Room 8603
Washington, D.C. 20554

*International Transcription Service
2100 M Street, N.W., Room 140
Washington, D.C. 20037



V. Lynne Lyttle

* Indicates hand delivery.